IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :20.01.2006

CORAM:

THE HONOURABLE MR.JUSTICE P. SATHASIVAM
AND
THE HONOURABLE MR.JUSTICE N. PAUL VASANTHAKUMAR

Criminal Appeal Nos.1016 & 1370 of 2003

Murugan .. Appellant in C.A.1016/03

Ravikumar @ Kundu Ravi .. Appellant in C.A.1370/03

vs.

State rep. by
Inspector of Police
Selaiyoor Police Station
Chingleput District.
(Crime No.339/1999) .. Respondent in both the CAs

These criminal appeals are preferred under Sec.374 (2) of the Code of Criminal Procedure against the conviction and sentence passed by the learned Additional District and Sessions Judge, Fast Track Court I, Chingleput in S.C.No.354 of 2000 dated 19.05.2003.

For Appellant : Mr.R.Sankarasubbu
In Crl.A.1016/03

For Appellant : Mr.Kumaraguru
In Crl.A.1370/03 for Mr.S.Sairaman

For Respondent : Mr.V.M.R.Rajendran
in both Appeals Additional Public Prosecutor

COMMON JUDGMENT

(Judgment of the Court was delivered by P. SATHASIVAM,J.)

One Ravikumar @ Kundu Ravi (A1) in Sessions Case No.354 of 2000 on the file of Additional District Judge (Fast Track Court No.I) Chingleput, who suffered the punishment of life imprisonment and fine of Rs.1,000/-, in default six months rigorous imprisonment, has filed Criminal Appeal No.1370 of 2003. The second accused, viz., Murugan in the same Sessions Case questioning his conviction under Section 376 (g) read with 34 IPC and sentence to undergo 10 years rigorous

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imprisonment and fine of Rs.1,000/-, in default six months rigorous imprisonment, has filed Criminal Appeal No.1016 of 2003. The third and 4th accused who suffered imprisonment of 10 years and 4 years respectively have not filed appeal.

2. The case of the prosecution is briefly stated hereunder:

(a) The deceased Rajeswari, on 28.05.1999 morning went to Madras Christian College to get an application form for the college admission. Since she did not return home, PW.15, mother of the deceased, went in search of her and enquired her daughter's friend PW.7. PW.15, on 30.05.1999, gave a complaint to Tambaram Police Station and the same was registered as "girl missing".

(b) On 02.06.1999, at about 01.30 p.m. PW.3, Watchman of Madras Christian College saw a dead body in a highly decomposed status in the campus near pumping station and water tank. He immediately informed about the same to PW.2, who is the Security Officer of Madras Christian College. PW.2, in turn informed PW.1, Bursar and he lodged a report before PW.24, Sub-inspector of Selaiyur Police Station, who registered the complaint as First Information Report under Section 174 Crl.P.C. in Crime No.339 of 1999.

(c) PW.26, the Investigating Officer in charge took up the investigation and examined the witnesses. On 04.06.1999, he sent the body for post mortem to PW.11 through Ex.P7. PW.11, conducted autopsy and gave a report Ex.P8 on 07.06.1999. PW.26, seized bangles through Form 95 i.e., Mos.1 and 2 and took photographs of the body and sent the photo and skull for superimposition. PW.27 took up the investigation on 16.06.1999.

(d) A.4 on 06.07.1999 at 12.30 p.m. went to PW.8, who is a friend of his father and gave extra judicial confession saying that on 28.05.1999, he along with A.1 to A.3 went to Madras Christian College water tank area to have drinks and at that time, they noticed a girl of 17 years going inside the campus and A.1 asked shall we rape her. On the direction of A.1, all the four agreed and way-laid the deceased, took her to nearby water tank and raped her one by one. When A.1 was raping, she gave alarm due to pain and at that time, A.1 strangulated her and she died. Then they kept the body on the footpath. After two months, he saw the news in the paper and from that time he became restless and decided to surrender to the police. When PW.8 asked him to surrender, he refused and ran away. PW.8 gave a complaint on the same day at 12.00 noon at the Selaiyoor Police Station. The complaint has been marked as Ex.P.3.

(e) On the same day at 3.30 p.m. A.4 was arrested in the presence of PW.18 and PW.21 and his confession was recorded (Ex.P.55). On recovery of MO.4 cap under mahazar Ex.P.56.

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A.1 and A.2 were arrested on the same day at 5.15 p.m. in the presence of PWs.14 and 19. A.1 gave confession (Ex.P.15) and Mos.5 and 11 were recovered under mahazar Ex.P.57. A.3 surrendered on 09.07.1999 at 02.30 p.m. He gave confession (Ex.P.12) before PW.13 and recovered long size note book Ex.P.13 under mahazar Ex.P.14. A.4 gave a statement under Section 164 Cr.P.C. before Judicial Magistrate, Alandur, PW.9 on 13.07.1999 and the same was recorded in Ex.P.5; thereafter, charge sheet was laid.

3. When the accused were questioned under Section 313 Cr.P.C. with reference to the incriminating circumstances found against them, in the evidence of prosecution witnesses, they denied the same. Accused have not examined any witness on their side.

4. The learned Additional Sessions Judge, based on the extra judicial confession statement of A.4 to PW.8 and the statement under Section 164 Cr.P.C. by A.4 to Judicial Magistrate, Alandur (PW.9), accepted the prosecution case and found A.1 to A.4 guilty under Section 341 IPC, 376 read with 34 IPC. A.1 alone charged under Section 302 IPC convicted and sentenced to undergo life imprisonment as well as fine of Rs.1,000/-, in default six months rigorous imprisonment. In respect of Charge No.2, A.1 to A.3 sentenced to 10 years rigorous imprisonment and fine of Rs.1,000/-, in default six months rigorous imprisonment. No separate sentence was awarded in respect of charge I. In so far as charge No.4, A.2 to A.4 were acquitted. As said earlier, A.1 and A.2 alone preferred the above appeals.

5. Heard Mr. R. Sankarasubbu, learned counsel for the appellant in Crl.Appl.No.1016 of 2003, Mr. Kumaraguru, learned counsel for the appellant in Crl.Appl.No.1370 of 2003 and Mr. V.M.R. Rajendran, learned Additional Public Prosecutor for the State.

6. The only point for consideration in these appeals is, whether the prosecution has established the charges leveled against the accused?

7. The prosecution in order to sustain the charges, heavily relied on:

(a) Extra judicial confession statement of A.4 to PW.8, implicating all the four accused; and

(b) Confession statement of A.4 under Section 164 Cr.P.C. before the Judicial Magistrate, Alandur (PW.9).

8. It is not in dispute that except the extra judicial confession statement of A.4 before PW.8 and before the Judicial Magistrate, Alandur (PW.9) under Section 164 Cr.P.C., no other material was pressed into service. Ex.P.3 is a complaint by PW.8 to the Inspector of Police, Selaiyoor Police Station, wherein, the complainant one Periyasamy, PW.8, has narrated that the 4th accused Velu @ Velmurugan son of Palani is known to me and he is a Painter by profession. The said Velu (A.4) on 06.07.1999 at 10.30 a.m. came

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to his house and when he enquired, he made a statement that on 28.05.1999, he and his friends Ravikumar @ Kundu Ravi (A.1), Murugan (A.2) and Kutti (A.3), after climbing over Charli School Compound, entered Madras Christian College Campus and while taking liquor near water tank, on seeing a 17 year old girl walking all along, all four decided to rape her. On direction of A.1, the girl (Rajeswari) was taken to nearby water tank. He also informed that after committing rape by all four, they thrown her in a nearby mud road. He further stated that after seeing the news item regarding death of a girl inside the Madras Christian College Campus, he had a sleepless night and he came and narrated the incident. It is also stated that though PW.8 requested A.4 to surrender, he ran away. PW.8 in his evidence before Court reiterated the statement made in Ex.P.3. It is seen from Ex.P.3 and the evidence of PW.8, while admitting the guilt, he also implicated the other three accused. Except A.4, it is not the case of prosecution that the other accused A.1 to A.3 made a confession statement admitting the guilt.

9. No doubt, after their arrest, recoveries were made based on their statement. In this regard, learned counsel for the appellants relied on the judgment of the Supreme Court in the case of Kojja Sreenu vs. State of Andhra Pradesh reported in 2005 S.C.C. (Cri.) 853. While considering confession of co-accused under Section 313 Cr.P.C., viz., that he helped the appellant A.1 in throwing the dead body in the pond, their Lordships have held that the said statement being in the nature of a confession involving a co-accused, it was not safe to place reliance on the same in the absence of any corroboration whatsoever. Here again, as said earlier, the confession statement of co-accused, viz., A.4 implicating other 3 accused (A.1 to A.3) has not been corroborated by any other evidence. In such a circumstance, it is not safe to place reliance on the same in the absence of corroboration whatsoever. The learned Additional Sessions Judge, failed to consider the above relevant aspect.

10. Coming to the second contention, viz., the statement of A.4 under Section 164 Cr.P.C. before the Judicial Magistrate, Alandur (PW.9), it is seen that the Inspector of Police, Selaiyoor Police Station made a requisition before the Additional Sessions Judge cum Chief Judicial Magistrate, Chengleput stating that A.4 Velu @ Velmurugan has intend to make voluntary confession statement and the same may be recorded by a Magistrate under Section 164 Cr.P.C. The requisition was marked as Ex.P.4. Pursuant to the said requisition, Additional District Judge cum Chief Judicial Magistrate, Chengleput in his proceedings dated 08.07.1999, directed the Judicial Magistrate, Alandur (PW.9) to record the statement under Section 164 Cr.P.C. from the accused Velu @ Velmurugan (A4) concerned in Selaiyoor Police Station in Crime No.339 of 1999. The said proceeding is Ex.P.5. Ex.P.6 is the confession statement of A.4, which was duly recorded by PW.9. A perusal of Ex.P.6 makes it clear that the learned Magistrate has followed the conditions prescribed in Section 164 Cr.P.C. However, it is the argument of the learned

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counsel for the appellants that though the learned Magistrate has warned the accused that there is no compulsion to make a statement admitting the offence and also that he was satisfied that the confession being made voluntarily, however, failed to make a memorandum at the foot of such recording as stated in sub-clause (4) of Section 164 Cr.P.C. It is useful to refer the relevant clause.

> "164. Recording of confessions and statements.-
> (1) ....
> (2) ....
> (3) ....
> (4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:
> "I have explained to (name) that he is not bound to make a confession and that, if he does so,any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct,and it contains a full and true account of the statement made by him.
>
> (Signed)A.B.,
> Magistrate. "

11. According to the learned counsel for the appellants, inasmuch as the memorandum at the bottom is a mandatory and in the absence of such memorandum, the judicial confession can have no force at all. In support of the above proposition, recent Division Bench decision of this Court (CDJ 2005 MHC 1185 Marimuthu & Others vs. State by Inspector of Police - Criminal Appeal No.514 of 1998 (N.Dhinakar and M. Chockalingam,JJ.) has been pressed into service. In that decision, before the Division Bench, the learned counsel for the appellant, while attacking the judicial confession alleged to have been made by A.2 before PW.7 submitted that it is not in accordance with law nor was it one made after following the procedural formalities, which are mandatory under Section 164 Cr.P.C and no evidentiary value can be attached to such confession. The Division Bench while considering the said question elaborately and after referring the decision of the Supreme Court in (1) AIR 1978 Supreme Court 1574 (Chandran vs. The State of Madras); (2) 1995 S.C. (Crl.) 323 (Shivappa vs. State of Karnataka); (3) 1996 S.C.C. 1118 (Tulsi Singh vs. State of Punjab); (4) 2001 S.C.C. 652 (Dhanajaya Reddy vs. State of Karnataka) and (5) 2002 S.C.C. 673 (Ayyub vs. State of U.P.), came to the conclusion that since the function of the Magistrate in recording confession under Section 164 Cr.P.c. is a

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solemn Act he must follow the procedural formalities and ensure that all the provisions are complied with properly. After finding that the learned Magistrate has not given a certificate as one required under Section 164 (4) of the Code, which is mandatory, the judicial confession Ex.P.6 therein is of no legal significance in the hands of the Court and set aside the conviction and sentence imposed by the trial Court and allowed the appeal. Though the learned Trial Judge in our case, in more than one place has explained that since the learned Judicial Magistrate (PW.9) has fully complied with the directions in Section 164 Cr.P.C., merely because no separate certificate / memorandum appended at the bottom of the statement, cannot vitiate the statement made before the Judicial Officer in view of various pronouncements of the Supreme Court starting from 1978 ending with 2002, we are unable to accept the reasoning of the learned Judge.

12. A reading of sub-clause (4) of Section 164 Cr.P.C. and as interpreted in various decisions, we are of the view that the Magistrate while recording confession under Section 164 Cr.P.C. must follow the procedural formalities and ensure that all the requirements of the provisions are complied with properly. Inasmuch as the certificate / memorandum as one required under Section 164 (4) Cr.P.C. is mandatory, we are of the opinion that the learned Magistrate (PW.9) has not strictly followed all the requirements of the provisions contemplated in order to ensure that the confession statement given by the accused was voluntary in nature. Accordingly, the document Ex.P.6 fall short of judicial confession as contemplated under Section 164 (4) of the Code. In such circumstances, it (Ex.P.6) has no legal significance in the light of the law. As said earlier, though certain recoveries were made, it is not in dispute that the root cause for the same is the statement of A.4 to PW.8 and PW.9. In view of our conclusion and the infirmities pointed out above, it would be unsafe to sustain the conviction.

13. Accused Nos.3 and 4 have not filed any appeal. Learned counsel for the appellants submits that even in the absence of an appeal by accused Nos.3 and 4, if the Court comes to a conclusion that they are not guilty of the offences, the Court has power to record their acquittal as well. In support of his contention, he relied on the judgments of the Supreme Court in the case of Suresh Chaudhary vs. State of Bihar reported in AIR 2003 SC 1981 and Gurucharan Kumar and another vs. State of Rajasthan reported in 2003 (2) ALT (Crl.) 35 (SC) : 2003 (2) SCC 698. The Supreme Court while dealing with S.L.Ps. in those cases held that if the Court reaches to the conclusion that conviction of any accused was not possible, the benefit of doubt must be extended to the co-accused similarly situated though he had not challenged the order of conviction by way of an appeal. In the light of the above conclusion of the Supreme Court and by exercising the powers under Sections 397 and 401 Cr.P.C., we order the acquittal of accused Nos.3 and 4 as well along with the appellants herein / accused Nos.1 and 2.

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Under the above circumstances, the appeal is allowed, setting aside the conviction and sentence imposed in Sessions Case No.354 of 2000 by the learned Additional Sessions Judge, Fast Track Court No.1, Chengalput against the appellants / accused Nos.1 and 2 as well as against accused Nos.3 and 4 viz., Kutti @ Velankanni, S/o.Marimuthu and Velu @ Velmurugan, S/o. Palani and all of them are acquitted of all the charges. They shall be released from custody forthwith, if not required in any other case. The fine amount, if paid by the appellants / accused, shall be refunded.

kh

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

1. The Additional District and Sessions Judge
   Fast Track Court No.1, Chengalpet.

2. The Additional District and Sessions Judge
   Chenglepet through the Principal Sessions Judge
   Chengalpet.

3. The Principal District Judge, Chengalpet.

4. The Superintendent,
   Central Prison, Vellore. (In duplicate for Communication to the detenue)

5. The Inspector of Police
   Salaiyoor Police Station
   Chengalpet District.

6. The Public Prosecutor, High Court, Madras.

7. The District Collector, Chengleput.

6. The Director General of Police
   Mylapore, Chennai 600 004.

+ one cc to Mr.S.Sriraman, Advocate Sr.No.2008.

AK (CO)
RSM/24.1.2006

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